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Supreme Court of the United States.

OCTOBER TERM, 1950.

PHILIP S. PARKER, JR.,
PETITIONER,
v.
DENIS W. DELANEY, COLLECTOR,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Justices of the Supreme Court of the United States:

The petitioner, Philip S. Parker, Jr., prays for a writ of certiorari to review the judgment of the Court of Appeals for the First Circuit entered December 28, 1950, in the case between the above-named parties, docketed therein as No. 4519.

Opinions Below.

The findings and opinion of the District Court are not reported in the Federal Supplement. They are printed in the Record, pp. 11-19. The opinion of the Court of Appeals is reported in 186 F. (2d) No. 6, p. 455. It is printed in the Record, pp. 21-28.

Jurisdiction.

This Court has jurisdiction under United States Code, Title 28, § 1254.

This application is made within the ninety-day period required by section 2101.

Question Presented.

Whether the taxpayer realized taxable income in 1945 from the abandonment for no consideration of four apartment house properties with respect to which he had deducted depreciation in prior years.

Statute Involved.

The statute involved is Internal Revenue Code (26 U.S.C.), sec. 111 (a) and (b), viz.:

> "SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS—(a) COMPUTATION OF GAIN OR LOSS.
>
> "The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.
>
> "(b) AMOUNT REALIZED.
>
> "The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received."

Statement.

The taxpayer (more strictly a partnership of which petitioner was a member and to all the business of which he has succeeded) in 1933, 1934 and 1936 made arrangements with two savings banks to take over and undertake the management of four apartment house properties (specified in Schedule A hereto) (R. 10, 14) held by the banks after foreclosure proceedings (R. 24). The same general factual pattern of transactions applies to each property. It was deeded by the bank to a straw man who acted for the taxpayer. The straw gave the bank a note in the amount stated in Schedule A, secured by a first mortgage for three years on the property. He gave the taxpayer a second mortgage on the property, with power of attorney to operate the same. He also gave the taxpayer a deed to the property. The mortgages were recorded but the deeds were not recorded. None of the foregoing instruments were executed by the taxpayer; no agreement was entered into which restricted the rights of the banks to foreclose their mortgages in event of default, or which obligated the taxpayer to continue the management of the properties (R. 8, 9).

Prior to the year 1945 the operation of the properties produced enough net income to amortize said first mortgages in a total amount of $13,989.38 (Schedule A). During this period the taxpayer, initially the partnership, for federal income tax purposes, reported all the income and took all deductions to which he would be entitled as owner, including deductions for depreciation, in the amount of $45,280.48 (R. 9, Schedule A). In the year 1945 the mortgages were in default and the taxpayer and the banks agreed that the banks should take back the properties listed in Schedule A, and the taxpayer caused the straw to give quitclaim deeds to the banks, the holders of the first mort-

gages, and the second mortgages were discharged of record (R. 9).

Respondent on September 30, 1947, collected from the taxpayer federal income tax for 1945, imposed to the extent of $4533.31 with respect to a capital gain of $31,291.10 computed as constituting the difference between the face amounts of the mortgages at the times the deeds were given and the amounts of the mortgages when written (less depreciation) (Stip. par. 8, R. 9).

Specification of Errors.

1. The Court erred in determining that petitioner realized any amount of money or the fair market value of any property other than money, upon the conveyance of the properties to the banks.

2. The Court erred in holding that the case was governed by the decision of this Court in *Crane* v. *Commissioner of Internal Revenue,* 331 U.S. 1.

3. The Court erred in failing to hold that the intentional transfer of legal title to the apartment house properties from the petitioner to the banks without consideration constituted a gift from which the petitioner derived no income, but as a result of which the basis of the property in the hands of the donees was the same as in the hands of the petitioner, viz., cost less depreciation.

Reasons for Granting the Writ.

1. Basic revenue law is involved. Whether gain can be computed under Section 111 (a) and (b) by treating depreciation claimed in prior years as an amount of money or property other than money received in the taxable year is a basic question. Chief Judge Magruder in his concur-

ring opinion holds that the properties acquired an adjusted basis of *minus $31,291.10*, and that gain to that amount resulted from the comparison of *minus $31,291.10* with zero, which he properly finds was the amount received for the property. This is believed to be a wholly novel suggestion, unsupported by any authority. Whether property can acquire a minus basis from depreciation charges so that the taxpayer cannot give it away for nothing without incurring a taxable gain is extremely basic to the question of what constitutes gross income.

2. *Crane* v. *Commissioner* is misconstrued. In both the opinion and in the concurring opinion below it is stated that the case was controlled by the decision in *Crane* (R. 27, 29). But *Crane* is expressly limited to a case where the mortgagor not personally liable on the debt sells the property subject to the mortgage *and for additional consideration*. Thus in *Crane* the Court said:

> ". . . we think that a mortgagor, not personally liable on the debt, who *sells* the property subject to the mortgage *and for additional consideration*, realizes a benefit in the amount of the mortgage as well as the boot. *If a purchaser pays boot*, it is immaterial as to our problem whether the mortgagor is also to receive money from the purchaser to discharge the mortgage prior to sale, or whether he is merely to transfer subject to the mortgage . . . We are rather concerned with the reality that an owner of property, *mortgaged at a figure less than that at which the property will sell*, must and will treat the conditions of the mortgage exactly as if they were his personal obligations." (Emphasis supplied.)

The *Crane* case is thus carefully restricted to a case where (1) the property is *sold* and (2) *the seller receives*

boot. Neither of these conditions is present in our case. The *Crane* case not only contains no dictum or intimation as to the decision in our case, but appears expressly to exempt our case from any construction based on the *Crane* case. Thus in footnote No. 37 to the opinion it is stated:

> "*Obviously,* if the value of the property is less than the amount of the mortgage, a mortgagor who is not personally liable *cannot realize a benefit equal to the mortgage.* Consequently, a different problem might be encountered where a mortgagor *abandoned* the property or transferred it subject to the mortgage *without receiving boot. That is not this case.*" (Emphasis supplied.)

However, it is the case now under consideration. The Court was obviously fully aware that the case might arise, but was careful to provide no intimation or precedent for the proposition that the owner of property subject to a mortgage on which he is not liable and which is mortgaged at a figure at least equal to or greater than that at which it would sell and who does not sell it for boot, but abandons it for nothing, need or can be required to treat the mortgage as his personal obligation.

3. Appellant's argument that the transaction constituted a gift was ignored. Appellant contended strenuously that the 1945 transaction constituted intentional transfer of property worth less than the debt to which it was subject, and for no consideration, and that the donor realized no income from making the gift.* The question is not discussed in the opinion or in the concurring opinion. Chief Judge Magruder remarked at the argument that it was not a transfer of property of any value. But it is certainly possible to make a gift of property having no

*See attached brief.

value at the time. In such case the income tax consequences of a gift follow, namely, the donee takes the property at the donor's basis, that is, cost less depreciation, and if he later disposes of the property in a taxable transaction the depreciation claimed by the donor is then taken into account. This argument is elaborated in the following brief.

We urge that the writ issue to determine a question of federal law of such importance that it should be settled by this Court, and to prevent *Crane* from being extended by lower Courts into the fields of gifts and abandonments, to which this Court expressly reserved the question of its application.

Respectfully submitted,

EDWARD C. THAYER,

Attorney for the Petitioner.

SCHEDULE A.

Address	Mortgagee	Date Acquired	Date reconveyed	Amount of mortgage when deeded to mortgagee	Amount of mortgage when written at date of acquisition	Depreciation charged and deducted by plaintiff	Difference between original amount of mortgage less depreciation and amount of mortgage when deed was given
21, 23, 35 Westbourne Terrace, Brookline	Haverhill Savings Bank	12/24/36	1945	$58,888.00	$60,000.00	$8,634.00	$7,522.40
46 Carlton Street, Brookline	Merrimack River Bank	2/13/33	1945	64,989.72	68,000.00	11,564.97	8,544.69
55-61 Thatcher Street, Brookline	Merrimack River Savings Bank	8/ 1/34	1945	74,277.98	80,000.00	14,712.31	8,990.29
15, 17, 19 Westbourne Terrace, Brookline	Merrimack River Savings Bank	2/13/33	1945	60,854.92	65,000.00	10,368.80	6,223.72
							$31,291.10

BRIEF IN SUPPORT OF PETITION.

(1) The transfer of property worth less than the debt to which it is subject and for no consideration constitutes a gift and the tax consequences of a gift follow.

The question is discussed in the Rewrite Bulletin Division, 50 C.C.H., vol. 5, par. 8515, dated September 6, 1950. It is there stated at page 11277:

> "Mortgaged real estate may be the subject of a valid gift. As a general rule, there is a gift only where no consideration passes to the donor. . . . If the transferee pays no consideration and does not assume liability for the mortgage, but merely accepts a conveyance subject to the mortgage, the transfer would appear to be a gift. In *Crane* v. *Com., supra,* which involved a devise of mortgaged real estate, the Supreme Court held that the basis of the testamentary gift could not be reduced by the amount of the mortgage. The court expressly declined to consider the effect of a 'gift' of property subject to a mortgage which exceeds the value of the property and on which the transferor is not personally liable. . . .
>
> "The donor of mortgaged property, whether or not he is personally liable on the mortgage, of course realizes no gain or loss when he gives the property away. Where there is a valid gift of mortgaged real estate, after December 31, 1920, the property has the same basis in the hands of the donee as it had in the hands of the donor, except that for the purpose of determining loss upon a sale by the donee the basis is the fair market value at the time of the gift if such value is less than the donor's basis."

If these transactions are treated as we submit they should be, as a gift, namely, the intentional transfer of the properties subject to the excessive mortgages, but without receipt of any consideration therefor, such gift constitutes no realization upon the property by the donor. The basis of the property in the hands of the donee is the same as it would be in the hands of the donor, "except that if such basis (adjusted for the period prior to the date of the gift as provided in section (b)) is greater than the fair market value of the property at the time of the gift, then for the purpose of determining loss the basis shall be such fair market value." Section 113 (a) (2). Upon the realization upon the property by the donee gain or loss will be recognized. In the case of gain the basis would be the donor's cost of the property less the depreciation allowed or allowable to him. In the case of loss it would be such basis or the fair market value at the time of the gift, in case such fair market value is less.

(2) Such editorial comment as we have seen to date is unfavorable to the opinion below.

The Tax Bulletin, vol. 8, No. 6, Jan. 6, 1951, par. 82:

> "*Comment.* This is a mess, isn't it? Tax men have assumed that in Crane the Supreme Court indicated that there would be no tax in this type of situation where nothing was received over the mortgage. Properties are generally deeded back to mortgagees because they are worth less than the mortgage. If that is so, and the mortgage was created in connection with the purchase of the property, it would appear that there should be no gain under the line of cases typified by *Hirsch,* 115 F. (2d) 656. See, also *Charles L. Nutter,* 7 T.C. 480, Bar., V. 3, Par. 380 (Acquiesced). To make matters worse, it would seem immaterial

whether the depreciation deductions (which are responsible for the 'gain'), resulted in tax benefit. The tax will be imposed in either event, *Lutz & Schramm Co.*, 1 T.C. 682."

See also *Rabkin and Johnson, Federal Income Gift and Estate Taxation*, vol. 2 R4, § 3, p. 2507:

"If the adjusted basis of the property is less than the mortgage debt, and if the property is accepted in satisfaction of the debt, the mortgagor may realize income on the transaction (see discussion at S5 s 14). This would apparently not be the case if the mortgagor was not personally liable, unless he received 'boot' from the mortgagee in the transaction. See *Crane* v. *Com'r*, 331 U.S. 1, discussed at R3, § 2." And from the November 1950 Supplement, R4 § 3: "Contrary to statement in text, district court holds that owner not personally liable on mortgage realizes gain upon quitclaim to mortgagee without consideration, where basis of property has been reduced by depreciation below the amount of the mortgage. *Parker* v. *Delaney* (D. Ct. Mass., July 7, 1950)."

(3) The action of Congress with respect to the Revenue Bill of 1950 is significant.

The Revenue Bill of 1950, H.R. 8920, as reported by the House Ways and Means Committee, June 22, 1950, contained in Section 209 (d) a proposed amendment to Section 117, which provided that the abandonment of a capital asset or of property used in the trade or business should be considered a sale or exchange of such asset or property.

Section 211 (c) of the Bill as reported by the Senate Finance Committee (corresponding to Section 209, House Bill) omitted the above proposal. The report of the Senate Finance Committee, August 22, 1950, at page 83, stated:

> "This Committee has eliminated the amendments proposed to be made to the Internal Revenue Code by Sections 209 (b) and (d) of the House Bill, which would have changed the tax treatment of sales and exchanges of certain business property and abandonments of such property or capital assets."

No provision corresponding to Section 209 (d) of the House Bill appears in the Revenue Act of 1950.

Thus Congress rejected the proposal to treat an abandonment as equivalent to a sale or exchange, yet the abandonment is so treated in the opinion and the concurring opinion below.

Respectfully submitted,

EDWARD C. THAYER,
Attorney for the Petitioner.

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